U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 05 July 2005

CASE NO. 2004-LHC-00592

OWCP NO. 06-190090

In the Matter of:

RODNEY TERRY,
Claimant,

vs.

NAVY EXCHANGE,
Self-insured Employer,

and

CRAWFORD & COMPANY,
Third Party Administrator.

Appearances:

Steven Birnbaum, Esq.
For Claimant

William Brooks, II, Esq.
For Employer and Third Party Administrator

BEFORE: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

Rodney Terry ("Claimant") brings this claim under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter "the Act" or "the Longshore Act"), 33 U.S.C. § 901 *et seq.* against the Navy Exchange ("Employer") and its carrier. A formal hearing was held in San Francisco, California on October 14, 2004, at which all parties were represented by counsel and the following exhibits were admitted into evidence: Administrative Law Judge's Exhibits

("ALJX") 1-2, Claimant's Exhibits ("CX") 1-6,[1] and Employer's Exhibits ("RX") 1-15. Transcript ("Tr") at 15-17. On December 14, 2004, Claimant submitted his post-trial brief, hereby admitted as ALJX-3. On December 23, 2004, Employer submitted its post-trial brief, hereby admitted as ALJX-4.

Stipulations:

The parties agreed to the following stipulations:

1. The place of the injury [to Claimant's left knee] was the Naval Weapons Station parking lot, located at Goose Creek, South Carolina.

2. The date of the injury was November 11, 2002.

3. Disability commenced November 15, 2002.

4. Claimant became aware that his disability was work-related on November 15, 2002.

5. Employer had notice of the injury on November 11, 2002.

6. The Longshore Act applies to the claim.

7. At the time of the injury [to Claimant's left knee], an employer-employee relationship existed between Claimant and Employer.

8. Claimant has suffered an injury [to his left knee] which arose out of and in the course of employment.

9. The claim was timely noticed and filed.

10. Claimant has not yet reached maximum medical improvement.

11. Claimant's average weekly wage at the time of injury was $202.51 per week.

I accept all of the foregoing stipulations as they are supported by substantial evidence of record. *See Phelps v. Newport News Shipbuilding & Dry Dock Co.,* 16 BRBS 325, 327 (1984); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142, 144 fn. 2 (1985).

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1 The initial submission of Claimant's exhibits was in reverse numerical order. Therefore, Mr. Birnbaum took them back and agreed to put them in proper order and re-submit them by mail, with a copy to Mr. Brooks. Upon review of the new submission, I found that these too were in incomprehensible order and Dr. Sturz's deposition at CX 5 was missing numerous pages. An order was issued ordering Claimant to revise and re-submit the exhibits, such order was followed, and the current and final version of the exhibits was received on May 18, 2005, with a copy served on Mr. Brooks.

Issues in Dispute:

1. Whether Claimant suffered an injury to his right knee, low back, and cervical spine which arose out of and in the course of employment with Employer (causality);

2. Extent of disability commencing July 29, 2003;

3. Whether Employer is entitled to a credit for compensation paid pursuant to my order issued on August 12, 2004.[2]

SUMMARY OF DECISION

Claimant did not suffer an injury to his right knee, low back or cervical spine which arose out of and in the course of his employment with Employer. Claimant was temporarily totally disabled from July 29, 2003 through December 14, 2003, and is entitled to full compensation for that period. Claimant was capable of performing suitable alternative employment beginning December 15, 2003 to the present and continuing. Because his potential earnings from suitable alternative employment exceed his average weekly wage at the time of injury, Claimant is not entitled to compensation commencing December 15, 2003. Employer is entitled to a credit under Section 14(j) for compensation paid pursuant to my order issued on August 12, 2004.

SUMMARY OF EVIDENCE

The Claimant

At the time of his industrial injury, Rodney Terry, the claimant in this matter, was employed as a sales clerk. He worked in the Garden Shop at the Charleston Naval Base Exchange. RX 10, 12, p.42. He was hired into that position on October 7, 2002. RX 11, p.15.

While performing his job as a sales clerk with Employer on November 11, 2002, Claimant injured his left knee while climbing into a semi-trailer being used to store overstock. Tr 26-27. Claimant finished his day's work, but the next morning he experienced pain and an inability to put weight on his left leg. Tr 27. Claimant sought medical treatment at the Naval Station Hospital's Orthopedic Clinic, CX 2, and filed a claim for longshore compensation.

Claimant moved to Washington state in December 2003, due to his wife's transfer to a naval base there as a member of the United States Navy. Tr 59. Since his move to Washington, Claimant has not sought employment, Tr 60-61, although he has assisted his father doing

2 A fourth issue not raised until Claimant submitted his post-trial brief, page 3, note 1, is Section 14(e) penalties. In his brief, Claimant stated that such penalties were due since Employer did not lodge a notice of controversion until October 24, 2003, whereas it cut off benefits on July 28, 2003. However, RX 4, p.7 demonstrates otherwise. That notice of controversion is dated December 2, 2002. Another notice of controversion was filed on October 24, 2003, following the Informal Conference held on October 9, 2003. RX 4, p.8.

automobile repair and maintenance at his father's business, Tr 32, and been paid a total of about $300.00-$350.00, in the form of a gift, Tr 33, according to Claimant. Claimant testified that he performed the following tasks while working for his father: hand his father tools, answer telephones, do paperwork, receive parts, clean the shop, assist in oil changes, change spark plugs and wires, replace serpentine belts, replace alternators, remove and replace tires on small cars. Tr 63-64.

Medical History

On November 19, 2002, Claimant's treating physician, Dr. James Gallentine, diagnosed a contusion of the left knee with evidence of pre-existing arthrosis, medial femoral condyle. CX 2D, p.26. Dr. Gallentine prescribed anti-inflammatories, a knee brace, and narcotic medication. *Id.* By December 12, 2002, Dr. Gallentine diagnosed: "possible acute cartilage injury at the base of arthrosis left knee." *Id*. at 29. By January 27, 2003, Dr. Gallentine diagnosed "contusion of medial patella." *Id*. at 34. On February 13, 2003, Dr. Gallentine performed a left knee arthroscopy with microfracture chondroplasty and lateral release. *Id*. at 36-38. After an attempt to remedy Claimant's continuing left knee problems with Synvisc injections, Claimant underwent another left knee surgery on August 4, 2003, performed by Dr. John Baker. The surgery consisted of evaluation of the chondral defect of the left patella, lysis of adhesions, and debridement of Claimant's left knee. CX 2A, p.4. During the period of Claimant's treatment by Drs. Gallentine and Baker, and before he moved to Washington state in December 2003, both doctors limited Claimant to light duty, using a form entitled "Recommendations for Change in Duty Status," which effectively precluded Claimant from returning to work in his former position as a sales clerk. CX 2A, p.5; CX 2C, p.22, 23. On December 2, 2003, Dr. Baker completed the last such document limiting Claimant's work activities to light duty. The limitations were extended for a thirty-day period, i.e., through January 1, 2004.

On July 29, 2003, six days before the August 4, 2003 surgery, Claimant was examined by Dr. Seth Kupferman for the second time. The first examination took place on May 7, 2003. In spite of the pending surgery, Dr. Kupferman opined that Claimant had reached maximum medical improvement and had no work restrictions. RX 6. Employer discontinued temporary total disability benefits on August 5, 2005, stating that Claimant was at "MMI as of 7/29/03 and able to return to his regular duties." RX 5.

Claimant first sought medical care after the December 2003 move to Washington in or around June 2004. Tr 62. He contacted Dr. McClensay, a Navy doctor, who referred him to Dr. Frederick Davis, an orthopedic specialist. Claimant saw Dr. Davis on June 16, 2004. Tr 60; CX 4, p.55. Dr. Davis's partner, Dr. Jefferson Cartwright then took over Claimant's case and saw Claimant twice before the trial, once in August 2004, and another indeterminate time (the report is undated). RX 8, p.12bb; CX 4. Dr. Cartwright recommends Claimant undergo a surgical procedure known as OATS.[3] Dr. Cartwright noted in the second undated report that Claimant

3 "OATS" stands for "osteochondral autogenous transfer system." At the time of trial, it was agreed by the parties that the reasonableness and necessity of the OATS procedure was not an issue ripe for adjudication. Tr 20, 21.

complained of right knee and back pain associated with the November 2002 injury to his left knee. The same was indicated on Dr. Davis's report of June 16, 2004. RX 8, p.12z.[4]

In addition to his treating physicians, Claimant was examined by Dr. Howard Sturtz, Employer's independent medical examiner. Dr Sturtz is board-certified in orthopaedic surgery since 1968. RX 9, p.13. Dr. Sturtz examined Claimant on June 29, 2004, and issued a report dated July 12, 2004, RX 8. Dr. Sturtz submitted two subsequent reports after reviewing further medical evidence, one on July 23, 2004, and one on September 10, 2004. *Id*. Dr. Sturtz was deposed on July 29, 2004. CX 5. Claimant was examined by his own orthopedic expert, Dr. Fred Blackwell, on June 6, 2004. CX 3. Dr. Blackwell also testified at trial. Dr. Blackwell is board-certified in orthopaedic surgery since 1974. He is also board-certified in forensic medicine since 1997. CX 6.

In June 2004, Claimant's complaints regarding his right knee, low back and neck were medically documented for the first time. The first indication of symptoms in those body parts appears in Dr. Blackwell's report of June 6, 2004, CX 3, after Claimant's attorney referred him for a medical evaluation. Upon examination Dr. Blackwell found a full range of motion in the neck, some limitation in range of motion of the back, some tenderness of the iliolumbar ligament bilaterally and of the left buttock, and some positive signs upon recumbent straight leg raising, but none in the seated position. There were no neurological findings and no abnormality found upon examination of the right knee. CX 3, p.47-48. Examination of the left knee revealed subpatellar tenderness with a positive and severe dynamic patellar compression test, tenderness of the suprapatellar, lateral parapatellar regions, and of the patellar ligament, limited range of motion on flexion and tenderness over the joint line laterally in the anterior and middle third. *Id.* at 48. Based on that examination the diagnoses made were: "1. Status post [left knee] arthroscopy x two. 2. Osteochondral defect, mid patella, with post-arthroscopy adhesion [left knee]. 3. Musculoligamentous strain and sprain, cervical and thoracolumbar spine. 4. Bilateral pes planus." CX 3, p.48. Dr. Blackwell recommended surgery and physical therapy and determined that Claimant was limited to "semi-sedentary work that which allows him to sit, stand and walk ad lib." *Id.* 52-53. Dr. Blackwell testified at trial that he was unaware of Claimant's work activities for his father. Tr 131.

At Dr. Sturtz's examination of Claimant on June 29, 2004, he recorded Claimant's complaints regarding his low back, neck and right knee. However, he found no objective substantiation of such complaints, and further found that Claimant was engaging in "symptom magnification, based on certain inconsistencies in the findings." RX 8, p.12w. In that regard, Dr. Sturtz testified that Claimant's "complaints are somewhat in excess of physical findings." CX 5, p.92. Dr. Sturtz agrees with Dr. Blackwell that Claimant is capable of semi-sedentary work. CX 5, p.110. Dr. Sturtz reviewed the vocational report generated by defense vocational expert Kent Schaeffer, see RX 14, and found that the eight positions referenced were consistent with Claimant's limitation to semi-sedentary work. CX 5, p.111. Dr. Sturtz further testified that Claimant was capable of performing such jobs dating back to three to four weeks after his August 2003 surgery and thereafter to the present, up to the date he might undergo a subsequent surgery such as the OATS procedure. CX 5, p.112-113.

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4 Claimant did not provide Dr. Davis's report; therefore, I have gleaned this information from Dr. Sturz's summary of medical evidence at RX 8.

Vocational Evidence

Kent Shafer, M.Ed. in counseling, has been a certified rehabilitation counselor since October 1982 and is registered with the state of Washington in that capacity. RX 15. Employer hired Mr. Shafer to prepare a labor market survey. His report is found at RX 14.

Mr. Shafer did not meet with Claimant but relied on Dr. Blackwell's assessment of Claimant's work limitations. Mr. Shafer summarized them as follows:

> Mr. Terry's subjective complaints consist of pain when going up and down stairs, occasional pain with sitting, and pain with walking and standing. He is unable to run, jump, climb or kneel, and has pain walking on hard or uneven surfaces. Mr. Terry also has back complaints, noting that he has pain with reaching, twisting, bending, leaning, and lifting in excess of 20 pounds, with a standing capacity of 10 to 15 minutes. Dr. Blackwell, under his section entitled Vocational Rehabilitation, indicated, "It is quite clear that Mr. Terry is not going to be able to return to work in his previous capacity and rehabilitation services are required. The patient currently is limited to semi-sedentary work which allows him to sit, stand and walk at [sic] lib."

RX 14, p.122.

Mr. Shafer conducted his first labor market survey on July 13 and 15, 2004. He found eight positions which would be suitable for Claimant based on his background and limitations: cage cashier, appointment setter (two positions), aerospace bench person, front desk agent, bench assembler, mechanical assembler, and courier.[5] RX 14, p.124. Mr. Shafer forwarded the labor market survey to Claimant through his attorney, on July 13 and 15, 2004.

Mr. Birnbaum forwarded the labor market survey to Claimant on or around those dates with a list of questions to ask the employers listed in the labor market survey. Claimant testified that he did call five of the eight employers listed sometime in July 2004, "probably" about a week to a week and a half after the list was forwarded to him.[6] Of the five Claimant called, he found three employers who said there was no position open: Precision Air Motive Corporation (bench assembler position), RX 14, p.131; Days Inn (front desk clerk), RX 14, p.132; and, Phoenix Central Labs (courier), RX 14, p.133. Mr. Shafer called Phoenix Labs on or around August 6, 2004, and found that they had hired in the courier position in late December 2003 and Spring 2004. RX 14, p.143a. When Claimant called the other two employers of the five listed, he did not talk to the same person that Mr. Shafer had at Volt Services (mechanical assembler position), Tr 45-46, RX 14, p.129, and the person he did talk to did not know if there was a job opening. It appears that Claimant did not talk to a person knowledgeable about job openings at

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5 Dr. Blackwell testified that the courier position was not appropriate for a person with Claimant's limitations. Tr 108. Dr. Sturz testified that all eight positions on the labor market survey (presumably, the first one, although both of them included the courier position) were consistent with Claimant's restriction to semi-sedentary work. CX 5, p.111. As I find Dr. Sturz the more credible witness, see p. 8-9, below, I accept his evaluation of the courier position as suitable to Claimant's limitations.

6 Claimant has no notes as to the precise day(s) he spoke to these employers. Tr 76.

that employer. When he called the final employer on the list, Blue Streak finishers (aerospace bench person), Claimant did talk to the same person as Mr. Shafer, but that person, named "Terry," refused to answer his questions. Claimant had a long list of questions he wished to pose, some of which were not relevant to a job search he would conduct himself, i.e., whether the employer hired felons.

Therefore, five of the positions listed appear to have been available to Claimant at the time of the July 2004 labor market survey: the two just discussed, aerospace bench person and mechanical assembler, and the three Claimant did not call: cage cashier and two appointment setter positions. Of those five positions, one does not appear suitable for Claimant; that is the aerospace bench position at Blue Streak Finishers. That position requires "[p]revious machine shop experience," and the job in question requires the employee to "grind and polish aerospace parts to meet specifications." RX 14, p.130. While Claimant did work in an assembly position putting together hydraulic and pneumatic cylinders, he was provided previously machined parts which he assembled, cleaned, tested and painted. *Id*. at 123. Thus, he did not grind and polish machine parts to specification, and the job description does not indicate that the employer would train a new employee to do that type of work nor did Mr. Shafer indicate that in his report.

I conclude that in July 2004, four positions suitable to Claimant's limitations, background, experience, and relevant geographic area were available to him: a cage cashier position at Tulalip Casino, two appointment setter jobs, one at Trendwest Resorts and one at ATS Northwest, and a mechanical assembler position at Volt Services. The lowest hourly wage for these jobs was $8.00, which converts to an average weekly wage of $320.00.

Mr. Shafer conducted another labor market survey on August 6, 2004, in which he attempted to determine suitable jobs available to Claimant in mid-December 2003 and thereafter. He phoned all of the employers on the July list, and of those, Phoenix Central Labs was hiring in the courier position in late December 2003 and Spring 2004, ATS Northwest had openings in January, March and April 2004, Volt Services had openings in February and April 2004, and Trendwest Resorts had openings in March and April 2004. RX 14, p.143a & b. In addition, Mr. Shafer perused his in-house job bank for jobs that would have been suitable for Claimant in the appropriate geographical area between December 2003 and July 2004. Of those listed two are questionable since they appear to require activities beyond Claimant's limitations: the cashier position at 75 Mr. Kleen, see RX 14, p.143d, requires restocking merchandise, cleaning the store, and emptying trash, and the employee may only sit during "business lulls" and when on breaks; the production worker position at Cashmere Molding, Inc., RX 14, p.143j, only allows sitting on breaks. The other positions appear suitable to Claimant and were available to him as follows: one job in December 2003 and one job on January 21, 2004, as a bench assembler at Express Personnel Services; RX 14, p.143l, one job as of March 17, 2004, as a production worker at Nouveau Vision, RX 14, p.143f; two assembler jobs as of April 21, 2004, one at Ioline Corporation, RX 14, p.143h, and one at Washington Security Products, RX 14, p.143i; as of May 13, 2004, one deburrer position at Westwood Precision, Inc., RX 14, p.143e; and, as of June 16, 2004, one production worker position at Adecco. RX 14, p.143g. The lowest hourly wage is also $8.00 for this second labor market survey, and thus the average weekly wage for this period remains $320.00.

ANALYSIS

Credibility Evaluations

Credibility of Medical Experts

Medical evidence is critical regarding two issues: extent of disability and causality of alleged impairment to the right knee, back and neck. As to extent of disability, only Dr. Kupferman stated that Claimant could return to full duty. All of the other doctors have opined that Claimant is capable of light or semi-sedentary work. However, Dr. Blackwell is somewhat inconsistent on the subject, sometimes opining that Claimant is temporarily totally disabled and at others stating that he is capable of semi-sedentary work. As to the causality issue, only Dr. Blackwell has opined that Claimant's industrial injury is responsible for Claimant's complaints of right knee, back and neck pain. Thus, to analyze the extent of disability and causality of injury to Claimant's body parts other than his left knee, I must determine which medical experts are the more credible.

"It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his [or her] own inferences from the evidence." *Wendler v. American National Red* Cross, 23 BRBS 408, 412 (1990). As for the opinions of medical witnesses, the United States Court of Appeals for the Ninth Circuit has held that a treating physician's opinion is entitled to special weight because he or she "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Amos v. Director*, OWCP, 153 F.3d 1051, 32 BRBS 144, 147 (CRT) (9th Cir. 1998), *citing Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). However, a treating doctor's opinion is not necessarily conclusive regarding a claimant's physical condition or the extent of his disability, and may in some circumstances be disregarded even if uncontradicted. For example, an administrative law judge can reject a treating physician's opinion that is "brief and conclusionary in form in the way of clinical findings to support [its] conclusion." *See Magallanes*, 881 F.2d at 751 (citation omitted). In addition, the special weight standard is limited to the treating doctor's opinion regarding treatment. *Amos*, 153 F.3d at 1054. Moreover, the court may reject the opinion of a treating physician which conflicts with the opinion of an examining physician, if the decision sets forth "specific, legitimate reasons for doing so that are based on substantial evidence in the record." *Magallanes*, 881 F.2d at 751.

In the instant case, no treating physicians testified at trial nor by deposition. The evidence in the record indicates that Drs. Baker and Gallentine are Claimant's only treating physicians as they alone treated Claimant during a reasonable period of time, repeatedly examined him, and performed surgery on him. Therefore, only those two physicians' opinions are entitled to special weight. While both have recommended that Claimant be confined to light duty, neither has rendered an opinion regarding impairment to Claimant's right knee, back or neck. Neither has a record of finding such impairments on examination[7] nor of complaints of such impairments.

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7 There is one record of Dr. Baker's that refers to Claimant's right knee. However, in the context of the statement, it is clearly a typographical error, and the reference in context should be to Claimant's *left* knee. *See* CX 2A, p.3, first paragraph, second through fifth sentences.

Dr. Cartwright, who is now treating Claimant, has only seen him twice; in addition, he has not rendered an opinion regarding Claimant's disability status. Nor has he opined that Claimant's complaints regarding his back, neck and right knee are work-related. That leaves Dr. Blackwell, Claimant's medical expert, and Dr. Sturz, Employer's medical expert. I do not count Dr. Kupferman in the equation since Dr. Sturz is Employer's current medical expert and Employer no longer relies on Dr. Kupferman's opinion, except in passing in its closing brief to justify the decision to discontinue compensation in July 2003.

Between Drs. Blackwell and Sturz, I find Dr. Sturz the more credible. Whereas Dr. Blackwell's testimony is inconsistent, Dr. Sturz's is not. Moreover, Dr. Sturz rendered several opinions which were not favorable to Employer. For instance, rather than accepting the medical opinion of Dr. Kupferman, Dr. Sturz found that the second surgery was related to the industrial injury. Dr. Sturtz also readily acknowledged that Claimant was in need of additional medical treatment, including a possible third surgery. Dr. Sturz did not slant his opinions to favor Employer; rather, he appeared to set forth his true assessment of Claimant's medical condition.

On the other hand, Dr. Blackwell, although well-qualified as an expert, presented contradictory testimony at the hearing and made statements which are inconsistent with his report. He testified on direct examination that Claimant is totally disabled, but revised his testimony on cross-examination, and stated that Claimant is currently capable of semi-sedentary work, a statement he had made in his report. *See* Tr 112-113, 130-131, 136-137; CX 3, p.53. Dr. Blackwell did not hesitate to advocate for Claimant and draw legal conclusions. For instance, he testified that because Claimant needs surgery and he is not at maximum medical improvement, he is "not capable of doing work at this point. He needs to proceed with that which I'm recommending." Tr 136. Furthermore, Dr. Blackwell's diagnosis of injuries to the right knee, neck and back, given a lack of objective findings, is in contrast to all of the other doctors. No medical report before June 2004 references complaints in these areas and no doctor other than Dr. Blackwell diagnoses injury thereto. Dr. Blackwell testified that he based his diagnoses on Claimant's subjective complaints and on findings he made on examination. However, he found nothing on examination to substantiate injury to the right knee and neck. Tr 122-123. Furthermore, while stating in his report that "[t]here is no specific identifiable pathology beyond his subjective complaints, related to the back," CX 3, p.53, Dr. Blackwell testified that he made findings on examination of Claimant's back to support a "strain/sprain" diagnosis, such as decreased range of motion on extension of five to ten degrees, asymmetric lateral bending with a decrease from normal of five to fifteen degrees, limited straight leg raising in the recumbent position (but no findings in the sitting position, CX 3. p.48), tenderness of ligaments in the back, Tr 123-124, but "nothing neurologically wrong, nothing that warranted studies, nothing that suggested we needed to do anything more than simply be aware that he had problems there." Tr 124.

Claimant's Credibility

I find that Claimant's testimony is lacking in credibility, and therefore am not able to rely on his subjective complaints to determine the extent of his disability. Claimant's complaints regarding his right knee, low back and neck are not credible in light of the objective medical evidence. Although Claimant testified that from February 2003, he reported symptoms in these

body parts (as well as headaches), Tr 54, no medical reports prepared over the next year and three months reference such complaints. The first report to reference them was Dr. Blackwell's, prepared in preparation for litigation.

Claimant also testified inconsistently about work for his father. Claimant testified on direct examination at the hearing that oftentimes, he would work one day a week for only a couple of hours, Tr 33, and that "almost all the time" he had to tell his father he was not up for working. Tr 35-36. However, on cross-examination and in his deposition testimony, he stated that every day that he was in Oregon, visiting his father, he would go with him to the shop and do work. Tr 62-63; RX 12, p.36-37.

In addition, Claimant failed to disclose his work activities for his father when he saw Drs. Blackwell and Sturz, Tr 131, CX 5, p.111, and specifically denied such activities when directly asked by Dr. Blackwell if he had worked since the second surgery. Tr 131-132.

Causality of Injury to Disputed Body Parts

Claimant has not filed a formal claim regarding injury to his neck and back. However, the parties agreed that an issue at the hearing would be injury to those body parts and to the right knee as a consequence of the acknowledged injury to Claimant's left knee. Claimant contends that after his second surgery in February 2003, he began to experience symptoms in these body parts which his doctors informed him were related to the altered gait engendered by his injured left knee. Claimant contends he informed all of his doctors of these symptoms. Employer contends that the evidence does not support Claimant's contention.

An injury compensable under the Act must arise out of and in the course of employment. Section 20(a) of the Act provides that "in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary — (a) that the claim comes within the provisions of the Act." 33 U.S.C. §920(a). Thus, to invoke the Section 20(a) presumption, the claimant must establish a *prima facie* case of compensability by showing that he or she suffered some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem*., 600 F.2d 280 (D.C. Cir. 1979), and that working conditions existed or an accident occurred that could have caused the harm or pain, *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). The presumption cannot be invoked if a claimant shows only that he or she suffers from some type of impairment. *U.S. Industries/ Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615, 102 S.Ct. 1312, 1317 (1982) ("The mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer"). However, a claimant is entitled to invoke the presumption if he or she presents at least "some evidence tending to establish" both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990).

Once the Section 20(a) presumption is invoked, the burden shifts to the employer. To rebut the presumption, the employer must present substantial evidence that the injury was not caused by the claimant's employment. *Dower v. General Dynamics Corp.*, 14 BRBS 324

(1981). "Substantial evidence" has been defined as "the kind of evidence a reasonable mind might accept as adequate to support a conclusion. . . . " *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187, 191 (CRT) (5th Cir. 1999); *see also American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71 (CRT) (7th Cir. 1999). In rebutting the presumption, an employer is not required to present evidence that would "rule out" causation with absolute certainty. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). If the presumption is rebutted, it falls out of the case, and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). The ultimate burden of proof then rests on the claimant under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994). *See also Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21 (1995).

Credible subjective symptoms and complaints of pain may be sufficient to establish a "harm" under Section 20(a). *Sylvester v. Bethlehem Steel Corp*, 14 BRBS 234, 236 (1981), *aff'd sub nom., Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982). In the instant case, Claimant is not credible. Therefore, his complaints of pain and other symptoms to the disputed body parts do not establish the Section 20(a) presumption. However, Claimant's medical expert, Dr. Blackwell, opined that Claimant had impairments to his back, neck and right knee as a result of the industrial injury to his left knee. CX 3, p.48; Tr 108-109. This amounts to "some evidence" that Claimant suffered an injury to those body parts as a result of the industrial accident in November 2002. Based on this evidence, although meager, I find that Claimant has established the Section 20(a) presumption that the alleged impairments to the body parts at issue are causally related to his industrial injury. However, Employer has offered substantial evidence to rebut the Section 20(a) presumption through Dr. Sturz's testimony. Dr. Sturz opined that Claimant did not sustain compensable injuries to the disputed body parts. CX 5, p.105. And based on the evidence as a whole, Claimant is unable to carry his burden to prove work-related injuries to the disputed body parts. Only Dr. Blackwell has diagnosed injuries to Claimant's neck, back and right knee in spite of no or weak findings on examination. Dr. Sturz found that physical examination and testing of these body parts was within normal limits. CX 5, p.101. Dr. Blackwell found no objective finding supporting impairment in the neck or right knee, and equivocal findings regarding the low back. Moreover, Dr. Blackwell contradicted himself regarding the low back, *cf.* Tr 123-124 and CX 3, p.53. In addition, such symptoms as Dr. Blackwell found in Claimant's back were based on testing that was within Claimant's control, such as straight leg raising and range of motion. As Claimant is not credible, relying on positive finding on such tests does not support a positive diagnosis. In summary, based on the preponderant evidence, I find that Claimant has not carried his burden, and I find no work-related injury to his neck, back and right knee.

Extent of Disability

Claimant contends that he is temporarily totally disabled since he has not yet reached maximum medical improvement and needs further surgery on his left knee. He claims he should not be expected to work, even if able, because it would be dishonest to take a job and then leave to have surgery. Moreover, he speculates that no employer would hire a person who needed

surgery in the near future. Finally, Claimant contends that it would be poor public policy to make a claimant return to work when the respondent was withholding needed surgery because it would reward such respondents for doing so.

Employer contends that while Claimant is not capable of returning to his pre-injury employment, he is capable of performing alternative work within his limitations, and therefore he is temporarily partially disabled, and, based on his average weekly wage and what he would earn if he engaged in suitable alternative employment, he is entitled to no compensation.

The burden of proving disability rests with the claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Disability requires a causal connection between a worker's physical injury and his inability to obtain work. If the claimant shows he cannot return to his prior job, it is the employer's burden to show that suitable alternate employment exists which he can perform. Under this standard, a claimant may be found to have either suffered no loss, a total loss, or a partial loss of wage earning capacity.

Here, the parties agree that Claimant has not reached maximum medical improvement, and therefore his disability is temporary. They also agree that he cannot return to his prior employment based on his work-related injury. Therefore, the burden shifts to the employer to show that Claimant can perform suitable alternative employment.

Suitable Alternative Employment

If it is shown that a claimant cannot return to his past job due to a work-related injury, the claimant is presumed to be totally disabled unless the employer is able to successfully demonstrate the existence of suitable alternate employment for the claimant in the geographical area where the claimant resides. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988). To satisfy its burden of showing suitable alternate employment, the employer must point to specific jobs that the claimant can perform. *Bumble Bee*, *supra*, at 1330. In addition, when considering whether a proposed job is suitable for a claimant, a factfinder must also consider the claimant's technical and verbal skills, as well as the likelihood that a person of the claimant's age, education, and employment background would be hired if he or she diligently sought the proposed job. *Hairston, supra*, at 1196; *Stevens v. Director, OWCP*, 909 F.2d 1256, 1258 (9th Cir. 1990). If the employer makes the requisite showing of suitable alternate employment, a claimant may rebut the employer's showing, and thus retain entitlement to total disability benefits, by demonstrating that he tried to obtain such work through "reasonable diligence," but was unsuccessful. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 n.2 (9th Cir. 1993); *Palombo v. Director, OWCP*, 937 F.2d 70 (2nd Cir. 1991); *Newport News Shipbuilding and Dry Dock*

Company v. Tann, 841 F.2d 540, 542 (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986).

Employer has carried its burden to show that Claimant was capable of performing suitable alternative employment since his move to Washington in December 2003. The first labor market survey showed that several positions were available to Claimant as of July 2004: cage cashier, appointment setter (two), and mechanical assembler. As of December 15, 2003,[8] two suitable jobs were available to Claimant in the relevant geographical region: courier for Phoenix Labs and bench assembler for Express Personnel Services. As of January 2004, two suitable jobs were available: appointment setter at ATS Northwest and bench assembler at Express Personnel Services. As of February 2004, another suitable job was available: mechanical assembler at Volt Services. As of March 2004, three additional jobs were available: appointment setter at ATS Northwest and at Trendwest Resorts, and production worker at Nouveau Vision. As of April 2004, two more suitable assembler jobs were available, one at Ioline Corporation and one at Washington Security Products. As of May 2004, one deburrer position was available at Westwood Precision and as of June 16, 2004, one production worker positon was available at Adecco. Thus, Employer has carried its burden to demonstrate that suitable alternative employment was available to Claimant from December 15, 2003 to the present.

The burden now shifts to Claimant to show that in spite of suitable alternative employment being available at the appropriate time, he was willing to work and made a reasonably diligent job search, but was unable to secure employment. Claimant is unable to carry his burden. Claimant admitted in his testimony that he made no effort to seek employment outside of the calls he made based on Mr. Shafer's labor market survey. While those calls may legitimately show that jobs were not available or were unsuitable, Claimant called only five of the eight employers on the list for the July 2004 survey and none of the additional employers on the list for jobs available from December 15, 2003 up to July 2004. While Claimant's rebuttal eliminated a few jobs, sufficient suitable jobs remained available to him beginning December 15, 2003. However, Claimant makes further arguments based on public policy. Claimant first argues that he should not be expected to look for employment when he is not at maximum medical improvement. Second, he contends that since he is anticipating surgery he should not seek employment because it would be (1) dishonest, and (2) employers would not hire him if he told them he was anticipating taking time off to undergo surgery. Unfortunately, Claimant cites no legal authority for this argument. Therefore, it must fail, per the Board's decision in *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000), wherein the Board states that a claimant cannot prevail by arguing that

> he was not required to seek work prior to his condition reaching maximum medical improvement. Moreover, if an employer is not willing to hire someone whose condition is not yet stagbilized, this fact will become apparent upon a diligent job search. (citation omitted) Claimant may not retain entitlement to total disability

8 While there is no specific date in the record regarding Claimant's move to Washington, Employer asked Mr. Shafer to find jobs in the relevant Washington geographical area available as of December 15, 2003. I will therefore assume that December 15, 2003, is the relevant start date when Claimant was available for jobs in Washington.

benefits merely by alleging that he did not seek work because he was unsure if he would be hired . . . ."

Berezin, 34 BRBS at 167.

Claimant also argues that as Claimant needs surgery and Employer has failed to authorize it in a timely manner based on Employer's own expert's (Dr. Sturz's) recommendation, Claimant should not be expected to obtain employment as that would only encourage unscrupulous employers and carriers to delay necessary surgery. Again, Claimant cites no authority for this theory, except to say there is no support in the Act for Employer's behavior. Contrary to Claimant's stance, as long as an employer controverts liability, he may suspend benefits pending a finding of entitlement. *See Krescholek v. Southern Stevedoring Co*., 223 F.3d 202, 206-08 (3d Cir. 2000) (following the reasoning of *American Mfr. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999)). I am unable to disregard the law in spite of its unfairness to some claimants. Thus, I find that Claimant's public policy arguments must fail and I must conclude that Claimant is unable to rebut Employer's showing of suitable alternative employment.

Remedy

Claimant is entitled to compensation from July 29, 2003 through December 14, 2003, based on the stipulated average weekly wage of $202.51, which entitles him to a compensation rate of the same under Section 6(b)(2) of the Act, since the minimum national average weekly wage ("NAWW") for that time frame exceeds Claimant's average weekly wage.[9]

Thereafter, based on Claimant's ability to perform suitable alternative employment, he is entitled to no compensation. This is based on the formula provided at Section 8(e) of the Act. According to that section, a claimant is entitled to two-thirds of the difference between his average weekly wage and his weekly earnings from his longshore or any other job during the time he is temporarily partially disabled. The minimum Claimant would earn from the jobs analyzed in Employer's labor market survey would be $8.00 an hour, or $320.00 a week. In calculating a claimant's entitlement to unscheduled disability benefits, the claimant's current earning capacity must be adjusted for wage inflation between the date of the work injury and the date that suitable alternate employment became available. *Bethard v. Sun Shipbuilding & Dry Dock Co.* 12 BRBS 691, 695 (1980); *Walker v. Washington Metropolitan Area Transit*

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9 Section 6(b)(2) states:

> Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

33 U.S.C. § 906(b)(2).

For July 29, 2003 to September 30, 2003 the minimum NAWW was $249.14, and for October 1, 2003 through December 14, 2003, it was $257.70. *See* <http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm>

Authority, 793 F.2d 319, 321 (D.C. Cir. 1986). Ordinarily, this adjustment is made by determining what wage level prevailed for the alternate employment at the time of the claimant's industrial injury. If no such evidence is available, the adjustment is made by decreasing the claimant's current residual wage earning capacity by an amount proportionate to the increase in the National Average Weekly Wage ("NAWW") since the date of the claimant's work injury. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

Based upon the labor market survey findings, Claimant's post-injury wage earning capacity is greater than his pre-injury wage earning capacity. Claimant's current average weekly wage based on suitable alternative employment is $320.00. Taking inflation into account, this amounts to the equivalent of $309.37 at the time of his industrial injury. ($498.27 (NAWW in November 2002) x $320.00 = 159,446.40 . $159,446.40 divided by $515.39 (NAWW in December 2003) = $309.37.) This amount exceeds Claimant's average weekly wage at the time of his injury, which was $202.51. Therefore, the difference between the two figures leaves a negative balance and Claimant is entitled to no temporary partial disability compensation.

Credit to Employer for Compensation Paid Since August 12, 2004

Employer has paid Claimant compensation pursuant to its agreement and reflected in the order I issued on August 12, 2004. Employer asks for a credit for such payments. Pursuant to Section 14(j) of the Act, Employer is entitled to such a credit. Section 14(j) states: "If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. § 914(j). Section 14(j) allows an employer a credit for its prior payments of compensation against any compensation subsequently found due. *Balzer v. General Dynamics Corp*., 22 BRBS 447, 451 (1989), *on recon., aff'd*, 23 BRBS 241 (1990). As Claimant is not entitled to compensation after December 15, 2003, there are no future compensation benefits from which Employer can be credited, unless and until Claimant undergoes future surgery and resumes the status of temporary total disability. In addition, Employer is not permitted a credit under Section 14(j) against future medical benefits, *Aurelio v. Louisiana Stevedores*, 22 BRBS 418, 423 (1989), *aff'd mem.,* 924 F.2d 1055 (5th Cir. 1991), nor against interest owed on past due benefits. *Castronova v. General Dynamics Corp.*, 20 BRBS 139, 141 (1987).

CONCLUSION

Claimant did not suffer an injury to his right knee, low back or cervical spine which arose out of and in the course of his employment with Employer. Claimant was temporarily totally disabled from July 29, 2003 through December 14, 2003, and is entitled to full compensation for that period. Claimant was capable of performing suitable alternative employment beginning December 15, 2003 to the present and continuing. Because his potential earnings from suitable alternative employment exceed his average weekly wage at the time of injury, Claimant is not entitled to compensation commencing December 15, 2003. Employer is entitled to a credit under Section 14(j) for compensation paid pursuant to my order issued on August 12, 2004.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and based upon the entire record, I issue the following order:

1. Employer shall pay Claimant temporary total disability at the compensation rate of $202.51 per week from November 15, 2002 through December 14, 2003.

2. Employer shall pay Claimant Section 7 benefits for injury to his left knee beginning November 11, 2002, to the present and continuing.

3. Employer shall pay interest on each unpaid installment of compensation from the date the compensation became due at the rates specified in 28 U.S.C. § 1961.

4. Employer is entitled to a credit for all compensation already paid to Claimant.

5. Counsel for Claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the counsel for Employer within 21 days of the date this Decision and Order is served. Counsel for Employer shall provide the undersigned and Claimant's counsel with a Statement of Objections to the Initial Petition for Fees and Costs within 21 days of the date the Petition for Fees is served. Within ten calendar days after service of the Statement of Objections, counsel for Claimant shall initiate a verbal discussion with counsel for Employer in an effort to amicably resolve as many of Employer's objections as possible. If the two counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes within 21 days after service of Employer's Statement of Objections, Claimant's counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with counsel for Employer, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for Employer no later than 30 days after service of Employer's Statement of Objections. Within 14 days after service of the Final Application, Employer shall file a Statement of Final Objections and serve a copy on counsel for Claimant. No further pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge